

| |
|--|
| Menaker & Herrmann, LLP v Foster |
| 2019 NY Slip Op 31767(U) |
| June 14, 2019 |
| Supreme Court, New York County |
| Docket Number: 651969/2016 |
| Judge: Lucy Billings |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----X

MENAKER & HERRMANN, LLP,

Index No. 651969/2016

Plaintiff

- against -

DECISION AND ORDER

MARTHA G. FOSTER, MATTHEW FOSTER, and
LARRY J. GUFFEY,

Defendants

-----X

LUCY BILLINGS, J.S.C.:

Defendants have moved to impose penalties for plaintiff's nondisclosure, to compel disclosure, to implead new parties, and to extend the time to complete disclosure. The motion is resolved pursuant to the stipulations on the record March 21, 2019, except insofar as defendants seek to compel production of plaintiff's Affiliation Agreement with Offit Kurman, P.A., and any other documents showing a merger between plaintiff law firm and Offit Kurman Law firm. C.P.L.R. § 3124. See Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 621-22 (2016). Defendants seek these documents to determine whether Offit Kurman may be liable for defendants' counterclaims as a successor to plaintiff, particularly in the event that plaintiff no longer is conducting business, plaintiff becomes insolvent, and its insurer disclaims coverage for defendants' counterclaims. C.P.L.R. § 3124. Plaintiff admits that it did affiliate with the larger firm Offit Kurman in April 2018 and is winding up its affairs, but maintains that it will continue that process for at

least another two years and currently continues as a separate, viable limited liability partnership.

Defendants are entitled to the Affiliation Agreement insofar as its terms bear on whether the relationship between plaintiff and Offit Kurman is or will become more than an affiliation and akin to an express or a de facto merger. If their transaction amounts to a merger, then Offit Kurman, under the agreement's express terms or under a theory of successor liability, may assume liability for plaintiff's conduct before the Affiliation Agreement. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 150 A.D.3d 490, 490-91 (1st Dep't 2017); Abreu v. Barkin & Assoc. Real Estate, LLC, 136 A.D.3d 600, 601-602 (1st Dep't 2016); Ring v. Elizabeth Found. for Arts, 136 A.D.3d 525, 526-27 (1st Dep't 2016); Fitzgerald v. Fahnestock & Co., 286 A.D.2d 573, 574-75 (1st Dep't 2001). After all, Offit Kurman is participating in this action, albeit as plaintiff's attorney, yet no reason has been offered why plaintiff is not representing itself or has not retained an attorney independent of the two firms. See Mahoney v. Turner Constr. Co., 61 A.D.3d 101, 105-106 (1st Dep't 2009).

Plaintiff does not claim that the Affiliation Agreement is privileged, see Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d at 628-29, but claims only that it is confidential. At most, the agreement reflects the exchange of information between the two firms to consummate their commercial transaction, rather than privileged information. Id. Such an exchange may reveal the structure of the transaction and how it

provides or fails to provide recourse to claimants against plaintiff. Id. at 630. Neither side has identified any other documents that might show a merger between the two firms.

Plaintiff has consented to the court's in camera review of the Affiliation Agreement, including its attached Exhibits, Schedules, and Examples. That review indicates that the agreement will assist defendants in ascertaining whether plaintiff has merged or will merge during the potential life of this litigation with Offit Kurman and whether it has assumed or will assume during the potential life of this litigation liability for plaintiff's conduct before the agreement. While plaintiff or Offit Kurman may maintain a legitimate interest in safeguarding from commercial piracy information that has contributed to the firm's success, plaintiff has not shown that any sections of the agreement include information used in either firm's business that gives the firm an advantage over competitors who do not know and use the information. Ashland Mgt. Inc. v. Altair Invs. NA, LLC, 14 N.Y.3d 774, 775 (2010); Ashland Mgt. Inc. v. Janien, 82 N.Y.2d 395, 407-408 (1993); Reed, Roberts Assoc. v. Strauman, 40 N.Y.2d 303, 308 (1976); Susan D. Fine Enters., LLC v. Steele, 66 A.D.3d 613, 614 (1st Dep't 2009). See Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d at 631; Calastri v. Overlook, 125 A.D.3d 554, 555 (1st Dep't 2015). Nothing shows that the information in the agreement is unknown outside the two firms or is difficult for another firm to acquire or duplicate or that the firms have taken any measures to guard

the secrecy of the information other than simply to recite in the agreement that the agreement is confidential. Ashland Mgt. Inc. v. Janien, 82 N.Y.2d at 407; Susan D. Fine Enters., LLC v. Steele, 66 A.D.3d at 614; Mann v. Cooper Tire Co., 33 A.D.3d 24, 32 (1st Dep't 2006); Buhler v. Maloney Consulting, 299 A.D.2d 190, 191 (1st Dep't 2002). Nor has plaintiff shown the value of the information in the agreement to the two firms or to their competitors or the resources expended in developing the information. Ashland Mgt. Inc. v. Janien, 82 N.Y.2d at 407; Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 124 (1st Dep't 1998).

Despite the Affiliation Agreement's confidentiality provision, its terms are material to the claims of defendant nonparties to the agreement that plaintiff has merged or will merge with Offit Kurman and that it has assumed or will assume liability for plaintiff's conduct before the agreement. Mahoney v. Turner Constr. Co., 61 A.D.3d at 104; Mann v. Cooper Tire Co., 33 A.D.3d at 33. See Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d at 621. Plaintiff has not suggested any way for defendants to obtain this information other than through the Affiliation Agreement. Mann v. Cooper Tire Co., 33 A.D.3d at 30-31. Evaluating plaintiff's or Offit Kurman's need to protect against any potential, as yet unshown, competitive harm against defendants' need to ascertain the parties potentially liable for their counterclaims, the firms' concerns may be accommodated short of denying defendants information that may be material to

their claims. Mahoney v. Turner Constr. Co., 61 A.D.3d at 106; Mann v. Cooper Tire Co., 33 A.D.3d at 29, 33-34.

Redaction of the Affiliation Agreement's references to either firm's past or current clients or to clients' "cases" using a client's name will preserve any confidentiality in the identity of the firms' clients, which in any event is immaterial to defendants' inquiry. Similarly, the attachments, which include an engagement letter with clients, a file retention policy, a sublease between the firms, its guaranty, lists of equipment, business costs, insurance claims, and pending legal proceedings, and the terms of partners' and employees' compensation and benefits, are immaterial to defendants' inquiry. Susan D. Fine Enters., LLC v. Steele, 66 A.D.3d at 614; Mahoney v. Turner Constr. Co., 61 A.D.3d at 106. If, based on the agreement's description of an Exhibit, Schedule, or Example, defendants believe they are entitled to a particular attachment, they may move to compel its production. C.P.L.R. § 3124. Plaintiff's or Offit Kurman's interest in confidentiality and in safeguarding against commercial piracy may be protected further by limiting disclosure of the agreement to defendants, their attorney, and their attorney's legal or expert assistants and by limiting the purpose for which they may use the agreement. Mahoney v. Turner Constr. Co., 61 A.D.3d at 105-106.

Consequently, the court grants defendants' motion to compel disclosure to the extent that, within five business days after entry of this order, plaintiff shall produce its Affiliation

Agreement with Offit Kurman, P.A., dated March 12, 2018, to defendants' attorney C.P.L.R. § 3124. Plaintiff may redact clients' names as delineated above and need not produce any of the Affiliation Agreement's attached Exhibits, Schedules, or Examples. Defendants shall not disseminate the Affiliation Agreement to anyone other than their attorney in this action, nor shall their attorney disseminate the agreement to anyone other than her legal or expert assistants in this action. The attorney shall assure that her assistants do not disseminate the agreement further. Neither defendants, nor their attorney, nor their attorney's assistants shall use the agreement for any purpose other than this action. Mahoney v. Turner Constr. Co., 61 A.D.3d at 105-106. The court otherwise denies defendants' motion to compel disclosure except to the extent set forth in the stipulations on the record March 21, 2019.

DATED: June 14, 2019

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.